IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

M/s Deejay Neelum Marble Industries Pvt.Ltd. v. Union of India and Ors.

S.B.CIVIL WRIT PETITION NO.5811/1993
under Articles 226 and 227 of the Constitution of India.

Date of Order : 15th February, 2006

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Rajendra Mehta, for the petitioner.
Mr. V.K.Mathur, Asstt.Solicitor General of India, for the respondents.

Reportable

BY THE COURT :

This petition for writ is directed to challenge initiation of proceedings under Section 4-I of the Imports and Exports (Control) Act, 1947 (hereinafter referred to as "the Act of 1947") against the petitioner under a notice to show cause dated 26.2.1993 issued by the Additional Director General of Foreign Trade, Government of India under Section 4-L of the said Act.

The Act of 1947 has already been repealed but in view of Section 20(2) of the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter

referred to as “the Act of 1992”) such repeal is having no effect on institution of proceedings for imposing penalty.

The office of the Chief Controller of Imports and Exports, Government of India granted a CG Licence dated 20.10.1980 for Rs.28,68,122/- to the petitioner with a condition to earn foreign exchange by exporting annually not less than 25% of the total production viz. marble slabs/blocks and other cladding material for a period of five years from the 18 months after commissioning of the plant and equipment and commencement of production.

The petitioner, a company incorporated under Companies Act, started production w.e.f. January, 1982 and was required to earn foreign exchange by exporting 25% of its products annually from the month of July, 1983 but for various reasons it failed to do so. The Additional Director General of Foreign Trade, by the impugned notice dated 26.2.1993, therefore, prima facie believing that the goods imported by the petitioner company under the licence dated 20.10.1980 were used and utilised otherwise then in accordance with the conditions of licence, initiated proceedings under Section 4-I(1)(a) of the Act of 1947.

The petitioner acknowledged receipt of notice to show cause dated 26.2.1993 and submitted a detailed

reply to the Additional Director General of Foreign Trade on 28.9.1993. The petitioner company while explaining the circumstances in which it failed to earn required foreign exchange also urged that no proceeding under Section 4-I(1)(a) of the Act of 1947 could be initiated as the petitioner never failed to discharge any user obligation under the licence dated 20.10.1980. The explanation submitted by the petitioner was not favourably considered, hence the instant petition for writ is preferred under Article 226 of the Constitution of India.

While giving challenge to the notice impugned dated 26.2.1993 issued for taking action under Section 4-I of the said Act it is urged by counsel for the petitioner that the liability for penalty under Section 4-I could be determined only in the event a person use or utilise goods or materials imported under a licence otherwise then in accordance with the conditions of such licence or letter of authority. The petitioner never used or utilised such goods or materials otherwise then in accordance with the conditions of licence dated 20.10.1980, as such initiation of proceedings under impugned notice for taking action under Section 4-I of the Act of 1947, according to the petitioner, lacks competence.

A reply to the writ petition has been filed on behalf of the respondents stating therein that the

petitioner company was issued with notice dated 26.2.1993 as the petitioner failed to fulfil its export obligation for the plant, machinery and equipment imported under the import licence. The relevant portion of the reply to provide cradle to the notice impugned, reads as under:-

> "That as regards averments made in paras No.5 and 6 of the writ petition the petitioner firm had obtained a CG licence No.P/CG/2081773 dated 20.10.1980 for Rs.26,68,122/- from the then O/o CCI & E, New Delhi with one of the conditions that they shall earn foreign exchange by exporting annually not less than 25% of their products namely marble slabs blocks and other cladding material for a period of 5 years from 18th month after the commissioning of the plant and equipment and commencement of production. The petitioner started production January, 1982 as admitted by the petitioner but they did not furnish any documentary evidence for fulfilment of export obligation. In the event of firm's failure to fulfil the conditions of CG licence, they were issued a show cause notice No.9/114/HQ/92-93/ECA.1 dated 16.6.1993 calling upon them to show cause why action should not be taken against them for their default."

From perusal of the averments contained in reply to the writ petition and as stated by learned counsel for the respondents it is apparent that the

respondents initiated proceedings against the petitioner under Section 4-I(1)(a) of the Act of 1947 as the petitioner failed to furnish documentary evidence for fulfilment of export obligation.

The counsel for the petitioner fairly accepted the failure to fulfil the export obligation, however, with all vehemence he urged that the proceedings so initiated under Section 4-I(1)(a) of the Act of 1947 could not be resorted for non-fulfilment of export obligation.

Heard counsel for the parties.

In precise, the controversy involved in the instant petition for writ is that whether any action can be taken under Section 4-I(1)(a) of the Act of 1947 against a person having licence or letter of authority in relation to any goods or materials which have been imported and who has failed to discharge export obligations or failed to adhere conditions which are not relating to use and utility of the goods or materials imported. Section 4-I(1)(a) of the Act of 1947 reads as under:-

> "Sec.4 I.Liability to penalty.-(1)Any person who.-(a) in relation to any goods or materials which have been imported under any licence or letter of authority, uses or utilise such goods or materials otherwise

> then in accordance with the conditions of such licence or letter of authority.....
> shall be liable to a penalty not exceeding five times the value of the goods or materials, or one thousand rupees, whichever is more, whether or not such goods or materials have been confiscated or are available for confiscation."

It is the position admitted that a licence dated 20.10.1980 was granted to the petitioner from the office of Chief Controller of Imports and Exports, Government of India, New Delhi with certain conditions mainly enumerated in Schedule-I and Schedule-II appended to the licence. The condition No.3 of Schedule-I appended with the licence provides that the goods covered under the licence shall be used for the manufacture of marble blocks. Condition No.10 of Schedule-I provides that the licence is also subject to the condition inter alia that the imported goods shall be used in the licence holder's factory as prototype only and shall not be sold or disposed of or permitted to be utilised by any other person or in any other manner except with the prior written permission of the licensing authority. The other conditions mentioned in Schedule-I are not relevant in present controversy and, therefore, reference of the same is not required.

The petitioner has admittedly not violated condition No.3 and Condition No.10 and even any other

condition mentioned in Schedule-I. The Schedule-II appended with the licence pertains to export conditions attached to the import licence dated 20.10.1980. According to the respondents the petitioner violated export conditions, specifically the condition No.4 and that warranted initiation of proceedings under Section 4-I(1)(a) of the Act of 1947. The condition No.4 of Schedule-II provides for earning foreign exchange by exporting annually not less than 25% production for a period of five years from the 18th months after commissioning the plant and equipment and commencement of production. A reading of Section 4-I(1)(a) of the Act of 1947 establishes it well that the proceedings to impose penalty can be instituted and penalty can be imposed, upon a licencee:-

> (i)in relation to any goods or materials which have been imported under any licence or letter of authority;
>
> (ii)uses or utilise such goods or materials;
>
> (iii)otherwise then in accordance with the conditions of such licence or letter of authority.

The three ingredients to face action under Section 4-I(1)(a) of the Act of 1947 relates to the use of imported goods and materials. These are not concerned to non performance with export conditions.

Meaning thereby, that the penalty under Section 4-I of the Act of 1947 is against the violation of user obligations and not against export obligations. It is also pertinent to note that under the Act of 1947 which stood repealed under the Act of 1992 there is no provision for imposing any penalty for violation or not adherence of export obligations.

The respondents by notice impugned sought to institute proceedings against the petitioner under Section 4-I of the Act of 1947 for violation of export obligations and not for any user obligation. It is not the case of the respondents that the petitioner used or utilised equipment and machineries imported under the licence dated 20.10.1980 otherwise then in accordance with the conditions of licence in question. The specific case of the respondents is that the petitioner failed to earn foreign exchange in accordance with the condition No.4 of Schedule-II appended with the licence.

The condition No.4 of Schedule-II appended with the licence is an export obligation and not a user obligation, therefore, initiation of proceedings for violation of it, under Section 4-I of the Act of 1947, is incompetent. The respondents lacks jurisdiction to proceed against the petitioner against Section 4-I of the Act of 1947 for violation of export obligation as penalty under Section 4-I of the said

Act can be imposed only if a licence holder uses or utilise goods and materials imported under a licence otherwise then in accordance with the conditions of licence.

In the present case the respondents failed to make out any case against the petitioner to the effect that the goods and materials imported under the licence dated 20.10.1980 were used and utilised otherwise then in accordance with the conditions of licence, therefore, the impugned notice is without jurisdiction and the same deserves to be quashed and set aside.

Accordingly, this petition for writ is allowed. The impugned notice dated 26.2.1993 issued by the office of Director General of Foreign Trace, Ministry of Commerce, Government of India, is hereby quashed.

No order as to costs.

(GOVIND MATHUR),J.

kkm/ps.